IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2004-CA-01837-COA

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF PAUL J. ROLAND, DECEASED: MARY JANE WILLIAMS MARLAR, JAMIE RAY WILLIAMS AND AMY JO WILLIAMS AND ESTATE OF FRANCES ROLAND	**APPELLANTS**
v.	
PAULA MARIE CASTILLO-RUIZ, MARTHA ANN ROLAND LYLES AND RHONDA LYNN STEWARD	**APPELLEES**

DATE OF JUDGMENT:	9/2/2004
TRIAL JUDGE:	HON. JACQUELINE ESTES MASK
COURT FROM WHICH APPEALED:	ALCORN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS:	REBECCA C. PHIPPS
ATTORNEY FOR APPELLEES:	W. JETT WILSON
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS, AND ESTATES
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FINDING GIFT TO FRANCES ROLAND LAPSED AND THAT INTEREST PASSED TO PAUL ROLAND'S HEIRS-AT-LAW.
DISPOSITION:	AFFIRMED: 01/31/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC

IRVING, J., FOR THE COURT:

¶1. Paul Roland died February 28, 2004, exactly one week after his wife Frances. He left a will that was probated in the Alcorn County Chancery Court. Paul's children and stepchildren disputed the interpretation of the residuary clause. Chancellor Jacqueline Estes Mask entered summary judgment in favor of Paul's children. She held the partial residuary gift to Frances lapsed and went to Paul's children as his heirs-at-law. Paul's stepchildren appeal, arguing his intent was to divide his estate equally among his children and stepchildren. We find no error in the chancellor's grant of

summary judgment, as we agree with the chancellor that there is no genuine issue of material fact.

FACTS

¶2. Paul and Frances Roland were married in February of 1975. Both Paul and Frances had children from prior marriages. Paul's children are Paula Castillo-Ruiz, Martha Lyles, and Rhonda Steward. Frances's children are Mary Marlar and Jamie Ray Williams. Frances's son Jimmy Dale Williams predeceased her and is survived by his only child Amy Jo.

¶3. On September 10, 1985, Paul and Frances made separate wills which were very similar in several aspects.[1] For example, the third paragraph in both wills gave household furniture, furnishings and fixtures to the surviving spouse. In the event that the spouse predeceased the testator, those items were to be sold at auction and the proceeds split fifty percent to Paul's children and fifty percent to Frances' children.

¶4. The fourth paragraph in both wills gave a life estate in the testator's undivided one-half interest in the marital home to the surviving spouse. The remainder was to go to their respective children.

¶5. The fifth paragraph in both wills contains the residuary clause. Paul's will states:

> All the rest and remainder of my property not heretofore disposed of shall be divided as follows:
>
> 1. To my wife Frances Williams Roland, an undivided one-half interest.

[1] The construction of Frances's will was not before the chancellor. The two estates are being administered separately. However, Frances's will was attached to the Appellants's response to the Appellees's motion for summary judgment in support of Appellants's argument that Paul intended, in the event Frances predeceased him, that his residuary estate be shared equally between his and Frances's children.

> 2. To my children, Paula Marie Roland Smith, Rhonda Lynn Roland Stewart[sic] and Martha Ann Roland Bradley, an undivided one-half interest, per stirpes and not per capita.

Similarly, Frances' will states:

> All the rest and remainder of my property not heretofore disposed of shall be divided as follows:
>
> 1. To my husband Paul J. Roland, an undivided one-half interest.
>
> 2. To my children, Jimmy Dale Williams, Mary Jane Williams Castile and Jamie Ray Williams, an undivided one-half interest, per stirpes and not per capita.

¶6. Frances died on February 21, 2004. Seven days later, Paul died. Both wills have been probated. The probate of Frances' will is still pending. Paul's will was probated in common form on March 11, 2004.

¶7. On April 15, Paul's children filed a complaint to determine Paul's heirs and beneficiaries. Frances's children were made defendants. In the prayer of the complaint, Paul's children asked that the court enter an order finding that any devise or bequest made to Frances, in the fifth paragraph of Paul's will, lapsed and that the devise or bequest passed to Paul's children as his sole heirs at law.

¶8. Both sides urged the chancellor to issue summary judgment in their favor. Frances's children argued that Paul's intent was for the estate to be divided equally among all six children. The chancellor entered summary judgment in favor of Paul's children.

STANDARD OF REVIEW

¶9. Rule 56(c) of the Mississippi Rules of Civil Procedure provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We review the decision to

grant a summary judgment on a de novo standard of review. *McMillan v. Rodriguez*, 823 So. 2d 1173, 1176-77 (¶9) (Miss. 2002) (citations omitted). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id.* at 1177 (¶9). If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor. *Id.* Issues of fact sufficient to require reversal of a summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. *Id.*

ANALYSIS AND DISCUSSION OF THE ISSUE

¶10. Frances' children argue that Paul and Frances intended for all six children to divide their estate equally, no matter which parent died first. Paul's children argue that the plain language of the residuary clause speaks for itself. They also claim that Paul's will did specifically provide for the contingency that Frances would predecease him as to other property. This, they argue, is evidence that Paul specifically intended not to provide for Frances's children in the residuary clause.

¶11. In arriving at her decision, to grant summary judgment, the learned chancellor wrote a well-reasoned opinion, amply supported by the well-settled law of this state. She found that there was no ambiguity within the four corners of Paul's will and that the effect that Frances's prior death would have on the distribution made in the residuary clause of Paul's will was clearly evident. We liberally quote from the chancellor's opinion and adopt her analysis:

> This issue turns on the identification of the proper source, or sources, from which the Court may gather evidence to discern the intent of the testator. As a rule of construction of written documents, parole evidence should not be allowed where the document is clear, definite and unambiguous. *Estate of Blunt v Pappas*, 611 So. 2d 862, 866 (1993); *Stovall v Stovall*, 360 So. 2d 679 (Miss. 1978). The "expressed intent of the testator is the guiding star rather than 'what he wished or may have wished.'" *Stovall*,

360 So. 2d at 681 (citing *Ferguson v Morgan*, 220 Miss. 266, 70 So. 2d 866 (1954)). The Court's

inquiry is to look first within the "four corners" of the document, and if no ambiguity exists within the writing, then no further search is needed or authorized.

> The Court has reviewed the will, and finds that it is clear and unambiguous. The provision in question does not suggest confusion on the part of Paul as to what should happen to his gift to Frances[2] should she predecease him. He specified that Frances should received one-half of his residuary estate, which is clear, and was silent as to the effect of her predeceasing him. The legal effect of his silence on this matter is also clear, as discussed below. And, therefore, with all due respect to the attorney who prepared the document and who submitted his affidavit herein, and who always does an excellent job when appearing before this Court and is extremely competent, parole evidence is inadmissible to alter the terms of the document for the purpose of speaking to the matter on what should happen to Frances' share of the residual estate should she pass on before him. The writing is clear and speaks for itself, and reference to other facts surrounding the execution of the will is unnecessary.
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> * * *
>
> It is also well-established as a principle of law in this state that where the beneficiary of a residuary bequest predeceases the testator, and the beneficiary is not a child or descendant of the testator, the interest which would have passed to the beneficiary passes instead to the surviving heirs at law of the testator. Miss Code Ann. § 91-5-7; *In re Estate of Mason*, 616 So. 2d 322, 329-30 (Miss. 1993); *Moffett v. Howard*, 392 So. 2d 509, 512 (Miss. 1981); *In re Will of Palmer*, 359 So. 2d 752, 754 (Miss. 1978); *Clark v. Case*, 207 Miss. 163, 42 So. 2d 109 (1949); *Kullman v. Dreyfus' Estate*, 201 Miss. 887, 30 2d 81 (1947); *Byrd v. Wallis*, 182 Miss. 499, 181 So. 727 (1938); *Marx v. Hale*, 131 Miss. 290, 95 So. 441 (1923). See, generally, *Annotation, Devolution of Lapsed Portion of Residuary Estate*, 36 A.L.R. 2d 1117. Therefore, the decision for the Court is whether this principle applies to this case, and the Court finds that as a matter of law this principle applies.
>
> Frances's children acknowledge the principle as set out above, but assert that this matter is distinguishable because Paul passed away only one week after Frances, and had little time within which to make changes to his will. However, the Court finds that inadequate proof is before the Court to establish that Paul lacked opportunity within which to make changes to his will, and further, more significantly, no authority has been provided to establish that the Court should consider such a factor in construing

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[2]The spelling of Frances's name in the record is Francis. The spelling in this opinion is that used in the Last Will and Testament of Frances Roland.

> the will.[3] Moreover, Paul executed his will in 1985, and in the nearly two decades between the execution of the will and his decease, more than sufficient time was allowed for him to anticipate such a contingency as Frances' passing away before him, and to make any changes to plan for a different handling of his estate in that event, if such had been his intention.

¶12. We agree with the chancellor. It does not take much forethought to realize that if Frances predeceased Paul, there would be nothing for her heirs to take under this provision in Paul's will, because Frances's heirs could claim only through her, and Frances would receive an undivided one-half interest in Paul's residuary estate only if she survived Paul.

¶13. The dissent notes that we do not discuss the controversy regarding Butch Baker. We do not discuss it because, unlike the dissent, we do not find that controversy relevant to the resolution of the issue of whether there is a genuine issue of material fact regarding Paul's intention with respect to Frances's children sharing in the residue of his estate. Apparently, the dissent believes that since all of the children, both Paul's and Frances's, signed an agreement to give Butch Paul's Cadillac and $30,000, that somehow proves that Paul intended that all of the children share equally in his estate. The fallacy of this argument is readily apparent. It was the children and not Paul who made that agreement. Nothing in Paul's will suggests that he intended to give Butch anything, much less his Cadillac and $30,000. Perhaps the reason Frances's children signed the agreement is that the $30,000

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[3]No allegations have been made that Paul expressed any desire to make amendments to his testamentary disposition following Frances's death. Further, as noted earlier, it is undisputed that Paul executed no testamentary documents following his execution of the will in question. The fact that a testator may not have changed his will in circumstances where we presume he would otherwise have done so does not authorize this Court to rewrite his will to fit what we suppose he would have wanted. *See, e.g., Hinders v. Hinders*, 828 So. 2d 1235 (Miss. 2002) (property settlement agreement in divorce action did not revoke husband's will which was executed during the marriage and left everything to his then-wife, and therefore ex-wife remained sole beneficiary under that will).

was to come from the sale of real property located at 1152 CR 400, Corinth, Alcorn County. The record does not inform us of the description of Frances and Paul's marital domicile. Perhaps the property located at 1152 CR 400, Corinth, Alcorn County was their marital domicile in which both Frances and Paul owned an undivided one-half interest. Nevertheless, what the children decided to do about a person not mentioned in Paul's will cannot create any ambiguity regarding Paul's intentions toward Frances's children.

¶14. We find no merit in the issues presented. Therefore, we affirm the decision of the chancellor.

¶15. THE JUDGMENT OF THE CHANCERY COURT OF ALCORN COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

KING, C.J., MYERS, P.J., CHANDLER, BARNES AND ISHEE, JJ., CONCUR. SOUTHWICK AND ROBERTS, JJ., NOT PARTICIPATING. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J.,

GRIFFIS, J., DISSENTING:

¶16. Finding the chancellor erred in excluding competent evidence and that a genuine issue of material fact exists as to Paul's intent, I dissent. I would reverse the summary judgment and remand this case for further proceedings.

¶17. Paul and Frances went to their lawyer, Jimmy Fisher's office to execute their wills. Fisher maintains it was their intent to divide their estates equally among all six children. The majority contends that the separate wills were "very similar in several aspects." Indeed, Paul and Frances executed reciprocal wills that were virtually identical. There was evidence that all children were aware of this intention. Neither Paul nor Frances ever revoked his or her will.

¶18. The third paragraph provided that the household furniture, furnishings and fixtures would first go to the surviving spouse. If the spouse predeceases the testator, these items would be sold at

auction and the proceeds split fifty percent to Paul's children and fifty percent to Frances' children. The effect of this clause is that these items are to be ultimately split evenly among both Paul's and Frances' children.

¶19. The fourth paragraph in both wills gave a life estate in the testator's undivided one-half interest in the marital home to the surviving spouse. The remainder was to go to their respective children. The effect of this clause is that the home is ultimately split evenly among the children.

¶20. The fifth paragraph in both wills contains the residuary clause, which is quoted by the majority. The sixth paragraph in both wills states, "Notwithstanding any of the foregoing" if Paul and Frances "die in a common disaster" all their property "except that bequeathed . . . in the SECOND [sic] paragraph" is to be sold at auction. An undivided one-half interest in the proceeds passes to Paula, Rhonda, and Martha, per stirpes and an undivided one-half interest passes to Jimmy Dale, Mary, and Jamie Ray, per stirpes.

¶21. The majority does not discuss the controversy that concerned Butch Baker. I believe it is relevant. It was alleged that Baker was raised like one of Paul's children, even though Baker was mentioned in neither Paul nor Frances' will. On March 30, 2004, all six of Paul's and Frances' children agreed to give Paul's Cadillac and $30,000 to Baker. Both the vehicle and the money was to come from Paul's residuary estate.

¶22. Two weeks later, Paul's children sued Frances' children and contested the interpretation of the residuary clause. Paul's children claimed the residuary bequest to Frances lapsed and went to them as Paul's only heirs-at-law. The net result of Paul's children's claim is that ultimately three-fourths of Paul and Frances' combined residuary estate would go to Paul's children, while only one-fourth would pass to Frances' children. Frances' children argued that Paul's intent was for the estate

to be divided equally among all six children. Both sides urged the chancellor to issue summary judgment. The chancellor entered summary judgment in favor of Paul's children.

¶23. The majority affirms the chancellor and finds no ambiguity in Paul's will. Thus, the majority affirms the chancellor's summary judgment that determined that Frances' children would not be entitled to any property under Paul's residuary clause. I disagree.

¶24. Frances' children presented an affidavit from Jimmy Fisher, the attorney who drafted both wills, where he testified that the intent of Paul and Frances was that all six children divide their estates equally, no matter which parent died first. Frances' children also claim that, when Paul's will is read as a whole, and against the backdrop that it was a reciprocal will with Frances, and the only interpretation of the residuary clause was that both wills are to be interpreted so that they take Frances' share under the residuary clause.

¶25. I am of the opinion that there was a clear dispute over Paul's intent. Frances' children offered evidence that would establish a genuine issue of material fact that would have to be resolved at trial. The chancellor, however, determined that the evidence offered by Frances' children was inadmissible and did not consider the evidence of Paul's intent when she granted summary judgment in favor of Paul's children. The chancellor concluded that the intent of the testator must come solely from the will and not from outside evidence. Since the residuary clause did not indicate what would happen to Frances' bequest, if she died before Paul, the chancellor held that it lapsed and went to Paul's children, as his heirs-at-law.

¶26. The ultimate inquiry in any will is the intent of the testator. *In re Granberry's Estate*, 310 So. 2d 708, 711 (Miss. 1975). There are two ways that extrinsic evidence may be considered to prove a testator's intent. The first rule is that parol evidence is permissible to prove intent if the will is

ambiguous. *Ross v. Brasell*, 511 So. 2d 492, 494 (Miss. 1987). However, there are two types of ambiguity. Robert A. Weems, *Wills and Administration of Estates in Mississippi* § 9:9 (3d ed. 2003). If a will is ambiguous on its face, this is "patent ambiguity." *Id*. Nevertheless, even a will that seems clear on its face may in reality be ambiguous. *Id*. If the testator's intent is uncertain when it is applied to the external facts, this is referred to as "latent ambiguity." *Id*.

¶27. For example, the will at issue in *Hutton v. Hutton*, 233 Miss. 458, 461, 102 So. 2d 424, 425 (Miss. 1958), was clear on its face when it bequeathed real property to "Rosalind Gwin Hutton." The will referred to the testator's granddaughter. *Id*., 102 So. 2d at 425. However, parol evidence was allowed to show that the will was latently ambiguous, because the testator had a daughter named Rosalind Gwin Hutton Johnson, whom she often referred to without the "Johnson." *Id*. at 465-66, 102 So. 2d at 426. Furthermore, parol evidence was allowed to show that the testator told another daughter that Mrs. Johnson was the intended beneficiary. *Id*. at 468, 102 So. 2d at 428.

¶28. Therefore, the first step is to determine if the will is ambiguous on its face. The chancellor was correct to find Paul's will to be unambiguous on its face. The terms used in the will are all clear, and the will is internally consistent.

¶29. The second step that the chancellor should have taken was to determine if Paul's will was latently ambiguous. Extrinsic evidence is necessary to make this determination. Instead, the chancellor expressly declined to look at outside evidence offered by Frances' children, and this was error. Considering Frances' will and the fact that both wills made extensive provisions to make sure that all six children took equally in all else, the residuary clause becomes latently ambiguous. By providing for Frances, did Paul believe he was ultimately providing for her children? Does "Frances" mean "Frances" or does it mean "Frances' estate?" This is certainly one interpretation of the clause,

especially in light of the fact that this would have been the result had Paul died first. This was the effect of Frances' residuary clause. Half of her estate went to Paul, and through him, went to his children. The problem with this interpretation is that Paul specifically provided for Frances' death in other clauses in the will but did not do so here. The other interpretation is that Paul did not want Frances' children to take under the residuary clause. The problem with this interpretation is that it is inconsistent with Paul's wishes in clause six. Paul's will provided that should he and Frances die in a common disaster, then all of his estate, less that disposed of in clause two, was to be split equally between his three children and Frances' three children. Why would Paul treat all six children equally with respect to the home, furniture, and the entire estate if he died with or before Frances, yet keep her kids out of his residuary estate if he died after Frances? For these reasons, I find the residuary clause to be latently ambiguous as to the disposition of half of Paul's residuary estate.

¶30. Another reason the trial court should have considered extrinsic evidence is because a court is obliged to consider the surrounding circumstances in determining testator's intent. *Granberry*, 310 So. 2d at 711. This necessarily implicates extrinsic evidence. *See, e.g., Estate of Wright*, 829 So. 2d 1274, 1277 (¶7) (Miss. Ct. App. 2002); Weems, *supra* at § 9:10. "When the intent of the testator has been *in this way ascertained*, all minor, subordinate and technical rules of construction must yield to the paramount intent thus ascertained." *Granberry*, 310 So. 2d at 711 (emphasis added).

¶31. The extrinsic evidence that accompanied Frances' children's response to summary judgment was Frances' will and Fisher's affidavit. I am of the opinion that both items were admissible to prove Paul's intent. Frances' will is admissible, as it was part of the surrounding circumstances at the time Paul's will was written and executed. Furthermore, the record reveals that Paul's children did not object to Frances' will being admitted into evidence.

¶32. Fisher's affidavit states that it was Paul and Frances' intention to have their combined estates split equally among all six children after both Paul and Frances died. Declarations of the testator expressing his intent may be admitted to clear up an ambiguity contained in the will. *Tinnin v. First United Bank of Miss.*, 570 So. 2d 1193, 1195 (Miss. 1990).

¶33. To the extent that Fisher's affidavit consists of statements of the testator expressing his intent, this evidence was admissible because the will should have been found to be latently ambiguous. To the extent that Fisher's affidavit explains the circumstances surrounding the execution of Paul's will (i.e., it was simultaneously executed with Frances as a reciprocal will), it was admissible to prove Paul's intent regardless of whether there was ambiguity or not.

¶34. With this evidence, I reach the conclusion that there exists a genuine issue of material fact concerning Paul's intent. When his will is read in light of this evidence, it suggests Paul intended to treat the disposition of his estate the same as the disposition of Frances' estate. Not only did he execute his will simultaneously with hers, using the same attorney, but their wills are virtually identical. It also suggests that Paul drafted his will with an eye towards his estate's ultimate equal disposition to all of the children. However, this is a genuine issue of material fact that is in dispute and should be resolved by the chancellor. Both sides have presented competent evidence that gives rise to the genuine material issue of whether or not Paul intended for all six children to share alike in his residuary estate.

¶35. Accordingly, I find that the chancellor erred in granting summary judgment and respectfully dissent. I would remand this case for further proceedings.

LEE, P.J., JOINS THIS SEPARATE OPINION.